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In the Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC., PETITIONER

v.

DENNIS CLINE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether, in the absence of an affirmative defense, the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(a)(1), prohibits an employer from favoring older over younger workers when both are protected by the Act.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case presents the question whether, in the absence of an affirmative defense, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 623(a)(1), prohibits an employer from favoring older over younger workers when both are protected by the Act. The United States has a substantial interest in the resolution of that question. The Equal Employment Opportunity Commission (EEOC) has responsibility for enforcing the ADEA and for issuing regulations to carry out its purposes. 29 U.S.C. 625 note, 626, 628. Following notice and comment, the EEOC in 1981 issued a regulation that provides that it is unlawful for an employer to prefer one worker in the protected group over another in the protected group based on either individual's age. 29 C.F.R. 1625.2(a). The decision in this case will affect

the validity of that regulation. The United States is also required by a separate provision of the ADEA to make personnel decisions affecting individuals who are at least 40 years of age free from any discrimination based on age. 29 U.S.C. 633a. The decision in this case could affect that statutory responsibility.

STATEMENT

Before July 1, 1997, the collective bargaining agreement between General Dynamics Land Systems, Inc. (petitioner) and the United Auto Workers (UAW) required petitioner to provide full health benefits to all retired workers who had accumulated 30 years of seniority. Pet. App. 2a-3a. Petitioner and the UAW negotiated a new agreement that became effective on July 1, 1997. *Id.* at 3a. Under the new agreement, only workers who were 50 years of age or older on July 1, 1997, remained eligible for full health benefits when they retired. *Ibid.*

A group of petitioner's employees who were between the ages of 40 and 49 on July 1, 1997 (respondents) filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that petitioner's new retiree health benefit plan discriminated against them on the basis of age, in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. 623(a)(1). The ADEA's protections extend to "individuals who are at least 40 years of age." 29 U.S.C. 631(a).

The EEOC determined that there was reason to believe that petitioner's agreement to provide retiree health benefits only to individuals who were at least 50 years of age on

July 1, 1997, violated the ADEA, and it invited petitioner to resolve the matter informally. J.A. 16-17. Respondents then filed suit in federal district court, challenging petitioner's age limitation on retiree health benefits as a violation of the ADEA. Pet. App. 3a. Respondents are 183 current employees who are no longer eligible for retiree health benefits; 10 employees who retired before July 1, 1997, in order to receive full health benefits; and three employees who retired after July 1, 1997, and are ineligible for health benefits. *Ibid.* Respondents sought declaratory and monetary relief. J.A. 13-14.

Petitioner filed a motion to dismiss for failure to state a claim, arguing that the ADEA does not forbid an employer from favoring older over younger protected workers. Pet. App. 22a. The district court granted the motion. *Id.* at 21a-25a. The court concluded that petitioner's collective bargaining agreement "facially discriminates on the basis of age by creating two classes of employees: employees over the age of fifty, who are entitled to retiree health care benefits, and employees under the age of fifty, who are not." *Id.* at 23a. The court nonetheless ruled against respondents on the ground that "a claim of reverse age discrimination is not cognizable under ADEA." *Id.* at 24a. The court reasoned that "Congress' purpose in enacting [the] ADEA was to address the problems faced by *older* workers, not workers who suffer discrimination because they are too young." *Ibid.*

The court of appeals reversed. Pet. App. 1a-20a. It noted that 29 U.S.C. 623(a)(1) protects "any individual" from employment discrimination "because of such individual's age," and that 29 U.S.C. 631(a) defines protected individuals as "individuals who are at least 40 years of age." Pet. App. 6a. That statutory language, the court concluded, unambiguously prohibits an employer from discriminating against individuals who are at least 40 by favoring workers who are older. *Ibid.*

The court of appeals discerned no conflict between that conclusion and the declarations in the ADEA's statement of findings and purpose, 29 U.S.C. 621, that the ADEA was designed to protect "older workers." Pet. App. 7a-8a. The court explained that "[i]n § 621, Congress declared its intention to protect older workers, and in § 623 and § 631, it identified the older workers it intends to protect as 'any individual' age 40 or older." *Id.* at 9a.

The court also noted that the EEOC has interpreted the ADEA to forbid an employer from favoring older over younger protected workers. Pet. App. 10a. The court was "persuaded that the EEOC's interpretation of the ADEA is a true rendering of the language." *Ibid.* The court added that "[i]f Congress wanted to limit the ADEA to protect only those workers who are *relatively* older, it clearly had the power and acuity to do so." *Id.* at 11a.

In a concurring opinion, Pet. App. 12a-18a, Judge Cole concluded that while Congress was most concerned with discrimination that favors younger over older employees, "Congress's choice of language, whether specifically intended or not, also prohibits age discrimination that favors older over younger protected employees." *Id.* at 12a. In reaching that conclusion, Judge Cole relied not only on 29 U.S.C. 623(a)(1) and 631, but also on 29 U.S.C. 623(*l*)(1)(A), which authorizes an employer to set a minimum age as a condition for eligibility in a pension plan. Pet. App. 14a. Judge Cole explained that "[i]f younger protected employees could not sue their employers for the preferable pension treatment of older employees, then the minimum age exception in § 623(*l*)(1)(a) would not be necessary." *Ibid.*

Judge Williams dissented. Pet. App. 18a-20a. Relying on Section's 621's statement that the ADEA is intended to protect "older workers," he concluded that the ADEA permits an employer to favor older over younger protected workers. *Ibid.*

SUMMARY OF ARGUMENT

The ADEA makes it unlawful for an employer to "discriminate against any individual * * * because of such individual's age," 29 U.S.C. 623(a)(1), and extends the Act's protections to "individuals who are at least 40 years of age." 29 U.S.C. 631. Under the most straightforward interpretation of that statutory text, it is unlawful for an employer to favor one worker who is at least 40 over another worker who is at least 40 because of either individual's age. To justify such discrimination, an employer must invoke one of the ADEA's affirmative defenses.

A. Petitioner contends that the term "age" in the ADEA actually means "old age," confining the reach of the ADEA to discrimination because of an individual's old age. Petitioner relies on several dictionaries that give "old age" as a secondary meaning of the term "age." But the original and most common meaning of "age" is the length of time a person has lived, and that is the way that Congress used the term throughout the ADEA. Indeed, the ADEA cannot function harmoniously otherwise.

Under petitioner's interpretation, an employer would be forbidden from placing an advertisement that indicates a hiring preference for persons based on old age, see 29 U.S.C. 623(e), but the employer would be free to commit the very discriminatory act that it could not advertise. Petitioner's interpretation would also render the BFOQ defense a nullity. See 29 U.S.C. 623(f)(1). An employer could invoke the BFOQ defense *only* when it wished to justify a preference for persons *over* a certain age, but, under petitioner's interpretation, that preference does not violate the ADEA's basic prohibition to begin with.

Moreover, if Congress had intended to limit the ADEA to discrimination because of an individual's *older* age, it could have easily accomplished that goal by adding the single

word, "older" to the ADEA's basic prohibition. Congress's failure to make that addition is particularly revealing because Congress used the term "older" in one of the ADEA's affirmative defenses to make clear that employers could favor older over younger protected workers in certain limited circumstances. See 29 U.S.C. 623(f)(2)(B)(i). Petitioner's interpretation would also make the provision authorizing an employer to establish minimum age limits for pension benefits superfluous. See 29 U.S.C. 623(*l*).

B. The ADEA's prohibition against discrimination that favors older over younger protected workers is consistent with Congress's statement that it was seeking to protect "older" workers and promote their employment "based on their ability rather than age." 29 U.S.C. 621. Under the ADEA, the "older" workers Congress sought to protect from arbitrary age discrimination are "individuals who are at least 40 years of age." 29 U.S.C. 631.

Indeed, Congress expressly modeled the ADEA on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a). In Title VII, Congress enacted a prohibition that protects any individual against discrimination because of race and sex, even though the principal problem that Congress sought to redress was discrimination based on a person's minority race and female sex. In the same way, Congress in the ADEA enacted a prohibition that protects any individual in the protected class against discrimination because of age, even though the principal problem that Congress sought to redress was discrimination directed at individuals based on their older age. The legislative history confirms that conclusion. In a considered statement, one of the ADEA's sponsors made clear that the ADEA prohibits discrimination between members of the protected class, regardless of whether the relatively older or relatively younger worker is favored.

C. Giving the ADEA that interpretation need not endanger health plans that are common among employers. The

ADEA, taken as a whole, both prohibits discrimination against younger workers in the protected class "because of age," and, through affirmative defenses, provides special accommodations for certain benefits. One of those affirmative defenses authorizes an employer to give different levels of benefits to older workers in the protected class when certain specific requirements are satisfied. See 29 U.S.C. 623(f)(2)(B)(i). Because petitioner did not raise that defense in its motion to dismiss in the district court or on appeal, and neither court addressed it, the question whether petitioner can satisfy the requirements of Section 623(f)(2)(B)(i) is not presented here. But the affirmative defense remains available to petitioner in district court.

D. Finally, after notice and comment, the EEOC issued a regulation that makes it unlawful to discriminate between two members of the protected class because of either individual's age. That interpretation accurately reflects Congress's clearly expressed intent and confirms that the ADEA generally prohibits all discrimination against protected workers because of age, not just discrimination because of an individual's older age.

ARGUMENT

IN THE ABSENCE OF AN AFFIRMATIVE DEFENSE, THE ADEA PROHIBITS AN EMPLOYER FROM FAVORING OLDER OVER YOUNGER WORKERS WHEN BOTH ARE PROTECTED BY THE ACT

Petitioner contends that the ADEA does not forbid an employer from intentionally favoring relatively older workers over employees who are younger but nonetheless protected by the Act. That contention is incorrect. In general, the ADEA forbids such age discrimination in employment. An employer that wishes to discriminate in that way may do so only when justified by one of the ADEA's affirmative defenses. Although the ADEA's affirmative defenses permit

benefit plans to favor relatively older workers if certain conditions are met, the ADEA generally prohibits age-based discrimination in advertising, hiring, promotion, and firing.

A. The Text Of The ADEA Generally Prohibits An Employer From Favoring Older Over Younger Protected Workers

1. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge *any individual* or otherwise discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age.*" 29 U.S.C. 623(a)(1) (emphasis added). The Act's protections extend to "individuals *who are at least 40 years of age.*" 29 U.S.C. 631 (emphasis added). Under the most natural reading of that statutory text, it is unlawful for an employer to favor one worker who is at least 40 over another worker who is at least 40 based on age, regardless of whether the favored individual is younger or older. In either case, the preference constitutes discrimination against a protected individual "because of such individual's age," 29 U.S.C. 623(a)(1), and violates the employer's duty under the ADEA "to ignore an employee's age." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993).

Relying on several dictionary definitions, petitioner contends (Br. 16-17) that the term "age" in Section 623(a)(1) actually means "old age." But the original and primary meaning of age is not old age, but the length of time that a person has lived.[1] Old age is a secondary meaning of age,

[1] *Webster's Third New International Dictionary* 40 (1993) ("1a(1). the length of time during which a being or thing has lived or existed"); *id.* at 17a (first definition is the one known to have been first used in English); *The American Heritage Dictionary* 33 (3d ed. 1992) ("1. The length of time that one has existed"); *id.* at xxxix (the first definition conveys the central meaning); *The Oxford American Dictionary and Language Guide* 18 (1999) ("1a. the length of time that a person or thing has existed or is likely to exist"); *id.* at How to Use the Dictionary, n.6 (the first definition is the most important); *Black's Law Dictionary* 57 (5th ed. 1979) ("The length of time during which a person has lived"). *The Random House Dictionary of the English Language*, 27 (1967) ("1. the length of time during which a being or thing has existed"); *id.* at A Guide to the Dictionary, xxix, V. Definitions (the most frequently encountered meaning appears as the first definition).

and one that usually can be discerned from immediate context, as in "hair white with age," "the infirmity of age," or "age cannot wither her."[2] There is nothing comparable in the immediate context of Section 623(a)(1) suggesting that Congress intended for the term "age" to have that special meaning instead of its original and primary meaning. See *Muscarello* v. *United States*, 524 U.S. 125, 128-132 (1998) (finding no evidence that Congress intended to depart from the "ordinary meaning" of the term "carry").

2. Moreover, the larger context of the ADEA makes clear that Congress used the term "age" to mean the length of time a person has lived, and not old age. Indeed, the ADEA can function coherently only if age is given its primary meaning throughout the statute. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (court must interpret statute as a "coherent" and "harmonious" whole); see also *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

[2] *The American Heritage Dictionary*, *supra*, at 33 ("4. The state of being old; old age: *hair white with age*"); *The Oxford American Dictionary*, *supra*, at 18 ("3. the latter part of life; old age (*the infirmity of age*)"); *Webster's Third New International Dictionary*, *supra*, at 40 ("1e(1) an advanced stage of life: the latter part of life: (the feebleness of [age]); 1e(2) the quality or state of being old; old age: ([age] cannot wither her)"); *Black's Law Dictionary*, *supra*, at 57 (not listing old age as a definition of age, but defining "aged person" as "[o]ne advanced in years"); *The Random House Dictionary*, *supra*, at 27 ("6. advanced years; old age: *His eyes were dim with age.*").

a. The ADEA's advertising prohibition makes it unlawful for an employer to place an advertisement relating to employment "indicating any preference, limitation, specification, or discrimination, based on age." 29 U.S.C. 623(e). The purpose of that prohibition is to reinforce the ADEA's basic prohibition by barring an employer from advertising employment preferences that are unlawful under Section 623(a). See *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 388-389 (1973) (upholding analogous state ban on advertising illegal preferences based on sex against a First Amendment challenge).

Petitioner's interpretation of the term "age," however, would break the link between the advertising prohibition in Section 623(e) and the illegal conduct prohibition in Section 623(a)(1). Under petitioner's view that age means "old age," an employer clearly would be forbidden by Section 623(e) from publishing an advertisement "indicating" a hiring "preference" based on "old age." Yet, despite the prohibition on advertisements favoring relatively older workers, the employer would be free under Section 621(a)(1) to commit the very discriminatory act that it could not advertise. For example, an employer would be barred by Section 623(e) from placing an advertisement seeking applications from workers "55 and over" for particular positions, but the employer would be free under Section 623(a)(1) to have a policy of hiring only workers who are "55 and over" for those very positions. Congress could not have intended to enact such an inexplicable scheme.

When age is given its original and primary meaning, the basic prohibition and the advertising prohibition work together harmoniously. An employer may neither place an advertisement seeking only workers 55 and over for particular positions, nor adopt a policy of hiring only workers 55 and over for those positions. Conversely, an employer may neither place an advertisement seeking only workers under

55 for particular positions, nor establish a policy of hiring only workers under 55 for those positions.

b. Petitioner's interpretation would also disrupt the relationship between the ADEA's basic prohibition and its bona fide occupational qualification (BFOQ) defense. The BFOQ defense, 29 U.S.C. 623(f)(1), provides that it is not unlawful for an employer to take any action that is "otherwise prohibited" by Section 623(a)(1) "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." The purpose of the BFOQ defense is to permit an employer to engage in age-based employment practices that would otherwise violate Section 623(a) when it can satisfy Section 623(f)(1)'s stringent BFOQ standard. *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 412, 414-417 (1985).

Under petitioner's view that "age" means "old age," however, an employer could invoke the BFOQ defense only when "old age" is a BFOQ. It would be unable to invoke the BFOQ defense to justify a preference for persons *under* a certain age even if it could show that such a preference is "reasonably necessary to the normal operation" of its business. 29 U.S.C. 623(f). For instance, an employer could not justify as a BFOQ a refusal to consider workers in the protected class for theatrical roles as teenagers or young adults. Congress could not have intended that result. Indeed, this Court has already held in *Criswell* that an employer may establish a preference for workers under a certain age when reasonably necessary for the normal operation of the business. 472 U.S. at 414.

Petitioner's interpretation would not only prevent the BFOQ defense from operating in accordance with Congress's intent; it would render it a nullity. An employer could invoke the BFOQ defense *only* to demonstrate that older age is a BFOQ, but it would *never* need to do that since, under petitioner's interpretation, a preference for older

workers does not violate the ADEA's basic prohibition in the first place.

Those anomalies disappear and the statue operates harmoniously when age is given its ordinary meaning throughout the statute. Section 623(a)(1) generally protects any individual who is at least 40 from discrimination based on age, regardless of whether the person so preferred is older or younger. At the same time, under Section 623(f)(1)'s BFOQ standard, an employer may adopt a preference for persons over a certain age and for persons under a certain age when it can show that the preference is reasonably necessary to the normal operation of its business.

3. Significantly, if Congress had intended to limit the scope of the ADEA to discrimination based on a protected class member's older age, it could have expressed that intent directly by adding a single word to the statute. Rather than prohibiting discrimination against a protected individual "because of such individual's age," Congress could have instead prohibited discrimination against a protected individual "because of such individual's *older* age." This Court has attached importance to Congress's failure to insert a single word into a statutory prohibition in similar circumstances. See *United States* v. *Turkette*, 452 U.S. 576, 581 (1981) (refusing to hold that the enterprises subject to the RICO statute are limited to legitimate enterprises on the ground that Congress "could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate'").

Congress's failure to insert the word "older" into Section 623(a)(1) is particularly revealing because Congress has demonstrated that it is capable of drawing a distinction between older and younger workers by adding, *inter alia*, the word "older" when it wishes to do so. Section 623(f)(2)(B)(i) provides an affirmative defense by allowing an employer to take action that would otherwise be prohibited by the ADEA "to observe the terms of a bona fide employee

benefit plan—(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an *older worker* is no less than that made or incurred on behalf of a *younger worker*, as permissible under section 1625.10, title 29, Code of Federal Regulations." 29 U.S.C. 623(f)(2)(B)(i) (emphasis added). Congress's failure to draw a similar distinction in the ADEA's basic prohibition shows that no such distinction was intended.

4. The pension eligibility defense in the ADEA, 29 U.S.C. 623(*l*), reinforces that conclusion. Section 623(*l*) specifies that it is not unlawful when "an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a *minimum age* as a condition of eligibility for normal or early retirement benefits." 29 U.S.C. 623(*l*)(1)(A) (emphasis added).

The most logical explanation for Section 623(*l*), which was added to the ADEA in 1990, is that Section 623(a)(1) generally prohibits discrimination against members of the protected class because of age, without regard to whether the distinction favors relatively younger or older protected workers, making it necessary to carve out an exception from that general prohibition for pension plans that set a minimum age as a condition of eligibility. Under petitioner's alternative view that the basic prohibition permits an employer to favor older over younger protected workers, Congress' effort to add Section 623(*l*) to the statute would be superfluous. See *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) (Congress ordinarily does not enact superfluous provisions).

5. In sum, viewing the ADEA's substantive provisions as a whole, Congress used the term age to refer to the length of time a person has lived, not old age. The ADEA therefore generally prohibits an employer from favoring older over younger protected workers because of age when it comes to advertising, hiring, promotion, and firing. To justify such a

preference, an employer must satisfy one of the ADEA's affirmative defenses, at least two of which specifically address benefit plans.

B. Other Sources Of Legislative Intent Confirm That The ADEA Generally Prohibits An Employer From Favoring Older Over Younger Protected Workers

Petitioner contends (Br. 18-28) that the ADEA's statement of findings and purpose, its extension of protection only to individuals who are at least 40, and its legislative history show that the ADEA prohibits only discrimination against an individual based on his old age. In fact, however, those sources confirm that the ADEA prohibits all discrimination against protected workers based on age, not just discrimination based on old age.

1. a. Congress's statement of findings and purpose are fully consistent with the conclusion that the ADEA prohibits an employer from favoring older over younger protected workers because of age. For example, one congressional finding was that "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." 29 U.S.C. 621(a)(1). For a 42-year-old employee who is fired because of his age and must seek new employment, it does not matter whether he was replaced by a 30-year-old or a 50-year-old employee. In either case, as an older worker, he may encounter great difficulty in finding a new job. Protection of that individual from either form of age discrimination is therefore consistent with one of Congress's reasons for enacting the ADEA.

The same is true with respect to Congress's stated purposes for the ADEA. Those purposes are "to promote employment of older persons *based on their ability* rather than age; to prohibit *arbitrary* age discrimination in employment; [and] to help employers and workers find ways of *meeting*

problems arising from the impact of age on employment. 29 U.S.C. 621(b) (emphasis added). To accomplish those objectives, it is not enough to protect relatively older workers from policies favoring relatively younger employees. Rather, age must generally be taken off the table as a relevant factor, except when affirmative defenses, such as the BFOQ provision, allow an employer to justify consideration of age. As Judge Cole explained in his concurring opinion in this case, when a 42-year-old loses his job and is replaced by a 50-year-old based on nothing more than age, that termination is not based on "ability"; it reflects "arbitrary age discrimination in employment"; and it is not a solution to the "problems arising out of the impact of age on employment." Pet. App. 14a-15a.

b. Contrary to petitioner's contention (Br. 18-19), Congress's references in the statement of findings and purpose to protecting "older workers" does not indicate that Congress intended to prohibit only discrimination based on older age. 29 U.S.C. 621. Under the ADEA, the "older workers" that Congress sought to protect against age discrimination are "individuals who are at least 40 years of age." 29 U.S.C. 631.

More fundamentally, while a statement of findings and purpose may reveal the principal concerns that animate legislation, they do not alter the scope of a law's substantive prohibitions. See *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260 (1994) (RICO finding does not alter the scope of the RICO statute). As this Court has explained, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); see *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989) (The occasion for enactment of the RICO

statute "was the perceived need to combat organized crime," but Congress "chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.").

Oncale itself is a dramatic illustration of that point. In that case, the Court held that male-on-male sexual harassment violates Title VII of the Civil Rights Act of 1964. In enacting Title VII, Congress was principally concerned about employment discrimination directed against racial minorities and women; its principal concern was "assuredly not" discrimination against men, much less discrimination that took the form of male-on-male sexual harassment. *Oncale*, 523 U.S. at 79. The *Oncale* Court nonetheless concluded that such discrimination violates Title VII because the text of Title VII broadly applies to all employment practices that discriminate against an individual because of such individual's sex. *Id.* at 79-80. Similarly, in *McDonald* v. *Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court held that Title VII protects whites from racial discrimination in employment, even though discrimination against racial minorities animated Title VII's prohibition against discrimination based on race. *Id.* at 278-280.

Oncale and *McDonald* are particularly instructive in this case because Congress modeled the ADEA's substantive prohibitions on Title VII's substantive prohibitions. Indeed, the substantive prohibitions are almost identical. Compare 29 U.S.C. 623(a)(1) (making it unlawful for an employer to "discriminate against any individual * * * because of such individual's age") with 42 U.S.C. 2000e-2(a)(1) (making it unlawful for an employer to "discriminate against any individual * * * because of such individual's race, color, religion, sex, or national origin"). It is therefore hardly surprising that Congress's prohibition in the ADEA sweeps more broadly than the immediate problem that animated enactment of the law. Just as Congress in Title VII enacted

a prohibition that protects any individual against discrimination because of race and sex, even though the principal problem that Congress sought to redress was discrimination based on a person's minority race and female sex, Congress in the ADEA enacted a prohibition that protects any individual in the protected class against discrimination because of age, even though the principal problem that Congress sought to redress was discrimination directed at individuals based on their older age.

2. Petitioner errs in contending (Br. 16) that Congress's decision to limit the ADEA's protections to persons who are at least 40 "refutes the notion that the Act forbids discrimination against younger individuals in favor of older workers." Rather, it shows only that Congress chose not to prohibit discrimination because of an individual's age *when the aggrieved worker is under 40.* Because Congress concluded that workers who are under 40, as a class, do not face the same difficulties in the workplace, or the same difficulties in regaining employment, as workers who are at least 40, Congress extended no protection to them. With respect to the group to which it did extend protection, however, Congress enacted a broad prohibition against any discrimination based on age, not just discrimination based on older age. Cf. *O'Connor* v. *Consolidated Coins Caterers Corp.*, 517 U.S. 308, 312 (1996) (noting that the ADEA "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older").

Nor is there anything "absurd" (Pet. Br. 23) about permitting a 40-year-old, but not a 39-year-old, to challenge a preference for a 50-year-old that is based on age. That difference is a function of Congress having chosen to protect persons who are 40, but not persons who are 39, from arbitrary age discrimination. For example, there is no question

that an individual who is 40 may sue under the ADEA when he is replaced by someone who is 30, but that a 39-year-old who is replaced by the same 30-year-old may not. For the same reason, an individual who is 40 may sue to challenge a preference for someone who is 50, but a person who is 39 may not. Although in both situations, the 39-year-old and 40-year-old may be aggrieved by arbitrary consideration of age, Congress rationally decided that, because persons 40 and over as a class have greater difficulty in finding re-employment than persons under 40 as a class, protection should be extended only to those 40 and over.

3. The legislative history also supports the conclusion that the ADEA generally prohibits an employer from discriminating between protected workers on the basis of age. In a separate statement attached to the Senate Report, Senator Dominic raised a question concerning whether an employer would be open to a charge of discrimination if he hired a 42-year-old over a 62-year-old or a 62-year-old over a 42-year-old. S. Rep. No. 723, 90th Cong., 1st Sess. 15 (1967). Senator Dominic noted that one committee counsel had stated that neither may sue, while another counsel had stated that both may sue. *Id.* at 16.

Senators Javits and Yarborough, two of the Act's principal sponsors, then engaged in a colloquy on the floor of the Senate to clarify that the ADEA *would prohibit either action* if taken on the basis of age. Senator Javits began the exchange as follows:

> The Senator from Colorado, in his individual views, has raised the possibility that the bill might not forbid discrimination between two persons each of whom would be between the ages of 40 and 65. As I understand it, that is not the intent of the legislation. I do not think any such reading is justified by the terms of the bill. I think we should nail this down. Section 4 of the bill specifically

> prohibits discrimination against any "individual" because of his age. It does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals ages 52 and 42 apply for the same job, and the employer selected the man age 42 solely * * * because he is younger than the man 52, then [the employer] will have violated the act. * * * Would the Senator from Texas be kind enough to advise the Senate whether he agrees with that interpretation of the bill?

113 Cong. Rec. 31,255 (1967).

Senator Yarborough, the floor manager of the bill, then responded as follows:

> I am glad that the Senator from New York has bought this question up for clarification. This matter was discussed in committee, but it was discussed in executive session. I think we should clarify this in the Congressional Record. It was not the intent of the sponsors of this legislation * * * to permit discrimination in employment on account of age, whether discrimination might be attempted between a man 38 and one 52 years of age, or between one 42 and one 52 years of age. *If two men applied for employment under the terms of this law, and one was 42 and one was 52, * * * [the] employer * * * could not turn either one down on the basis of the age factor. * * * The law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way his decision went.*

113 Cong. Rec. at 31,255 (emphasis added). While the stray remarks of a single representative are not controlling, those considered statements by the bill's sponsors are entitled to significant weight. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-527 (1982).

C. Petitioner's Reliance On *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), Is Misplaced

Petitioner contends (Br. 29-30) that *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), shows that the ADEA prohibits only discrimination based on older age. *O'Connor*, however, does no such thing.

In *O'Connor*, a plaintiff alleged that he was dismissed because of age. In support of that claim, he produced evidence that he was replaced by a younger worker who was over 40. The Fourth Circuit dismissed the plaintiff's claim, holding that an ADEA plaintiff can establish a prima facie case under the framework established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), only when he can show that he was replaced by someone outside the protected class. This Court reversed, holding that, under the text of the ADEA, "[t]he fact that one person in the protected class has lost out to another person in the protected class is * * * irrelevant, so long as he has lost out *because of his age*. 517 U.S. at 312 (emphasis in original). The Court went on to hold that a prima facie case requires evidence that raises an inference of discrimination based on age and that "such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger." *Id.* at 313. The Court explained that "[b]ecause the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Ibid.*

Petitioner argues (Br. 29) that *O'Connor* is controlling here because a person claiming that he has been treated less favorably than an older worker obviously cannot show that he has been treated less favorably than someone who is substantially younger. *O'Connor*, however, only addressed

what evidence is sufficient to establish a prima facie case *where the plaintiff's claim is that his employer discriminated against him in favor of a younger worker.* In that circumstance, a plaintiff proceeding under *McDonnell Douglas* must show that someone substantially younger was given more favorable treatment. *O'Connor* did not address whether a person in the protected class can state a claim under the ADEA by showing that someone older was given more favorable treatment on the basis of age.

The Court's decision in *McDonald* v. *Sante Fe* provides a striking parallel. Before *McDonald*, the Court in *McDonnell Douglas* had described the elements of a prima facie case under Title VII to include proof that the plaintiff "belongs to a racial minority." 411 U.S. at 802. In *McDonald*, the Court saw no inconsistency between that holding and its conclusion that Title VII prohibits racial discrimination in employment against whites as well. 427 U.S. at 279 n.6. The Court explained that *McDonnell Douglas*'s requirement that a plaintiff show that he belongs to a racial minority "was set out only to demonstrate how the racial character of the discrimination could be established in the most common sort of case, and not as an indication of any substantive limitation of Title VII's prohibition of racial discrimination." *Ibid.*

The situation is the same here. *O'Connor* devised the "substantially younger" requirement for the most common kind of ADEA case and the kind of case at issue there—one where the plaintiff alleges discrimination based on his older age. *O'Connor* does not establish any substantive limitation on the ADEA's general prohibition against age discrimination directed at persons who are at least 40 years of age. In any event, because *O'Connor* addressed only the nature of the evidence necessary to prove a violation through circumstantial evidence under the *McDonnell Douglas* framework, *O'Connor*'s proof requirement has no application where, as here, an employer's policy facially discriminates on the basis

of age. See *TWA* v. *Thurston*, 469 U.S. 111, 121 (1985) ("the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination").

Indeed, far from supporting petitioner, *O'Connor* reinforces that the ADEA prohibits all discrimination against protected workers because of age because *O'Connor* rejected the one argument that led some legislators to question whether the ADEA protected a 42-year old against age-based discrimination in favor of a 62-year-old. As described above (pp. 18-19, *supra*), Senator Dominic's concern was that neither the 42-year-old nor the 62-year-old could sue if they suffered age-discrimination vis-a-vis the other because they were both in the protected class. The colloquy between Senators Javits and Yarborough made clear that *both* could sue, and *O'Connor* verifies that conclusion by emphasizing that it is "irrelevant" whether the plaintiff "lost out to another person in the protected class," if "he has lost out *because of age*." 517 U.S. at 312.

D. The ADEA's General Prohibition Against Age Discrimination Does Not Endanger Bona Fide Benefit Plans That Favor Older Over Younger Protected Workers As Long As They Satisfy The Requirements of 29 U.S.C. 623(f)(2)(B)(i)

1. Petitioner contends (Br. 40-41) that, if Section 623(a)(1) prohibits an employer from favoring older over younger protected employees, it would endanger minimum age retiree health benefit plans that are "virtually ubiquitous" among employers. That argument ignores the effect of 29 U.S.C. 623(f)(2)(B)(i).

As amended by the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978, Section 623(f)(2)(B)(i) provides that it shall not be unlawful for an employer "to observe the terms of a bona fide employee benefit plan—(i) where, for each benefit or benefit package,

the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations." 29 U.S.C. 623(f)(2)(B)(i). In addition, the plan may not "require or permit the involuntary retirement of any [protected] individual." 29 U.S.C. 623(f)(2)(B) (proviso). The employer has the burden of proving that a plan satisfies those requirements. 29 U.S.C. 623(f)(2).

The text of Section 623(f)(2)(B)(i) establishes five basic requirements: (1) the employer's action must be taken pursuant to a "benefit plan"; (2) the benefit plan must be "bona fide"; (3) the employer must "observe" the plan; (4) the payment made or cost incurred on behalf of an older worker must be "no less than" that made or incurred on behalf of a younger worker; and (5) the plan may not "require or permit" involuntary retirement of a protected worker. Section 623(f)(2)(B)(i) incorporates the explanation of those requirements from the EEOC's preexisting regulation on benefit plans, which interpreted the original Section 623(f)(2). As long as the statutory requirements are satisfied in the manner set out in the EEOC's regulation, an employer may take action that is "otherwise prohibited" by the ADEA. 29 U.S.C. 623(f)(2). Thus, while Section 623(a)(1) generally prohibits an employer from providing a different level of benefits to protected individuals because of their age, Section 623(f)(2)(B)(i) permits an employer to engage in such discrimination when its specific requirements are satisfied.

By providing that the payment made or cost incurred on behalf of older workers must be "*no less than*" that incurred on behalf of younger workers, Section 623(f)(2)(B)(i) deliberately departs from the EEOC's preexisting regulation which had specified that an employer would have a defense "where the actual amount of payment made, or cost incurred, in

behalf of an older worker *is equal to* that made or incurred in behalf of a younger worker." 29 C.F.R. 1625.10 (1988) (emphasis added). That change makes clear that an employer that otherwise satisfies the provision's preconditions may make *greater* payments and incur *greater* costs on behalf of older workers than younger workers in the protected class. Furthermore, Section 623(f)(2)(B)(i) does not require as a precondition that the employer provide equal benefits to older and younger protected employees. Nor is such a condition contained within the five basic requirements. Indeed, the affirmative defense is triggered only when there is a disparity in benefits that would otherwise trigger the ADEA's basic prohibition of age discrimination. Accordingly, an employer that satisfies the five basic requirements is free to provide *greater benefits* to older workers in the protected class, even though such a practice would be "otherwise prohibited" by the ADEA. 29 U.S.C. 623(f)(2).

The legislative history confirms that understanding. The EEOC's then-General Counsel, Charles Shanor, testified in hearings before the Senate that the proposed amendment permits "an older employee to receive greater benefits or an employer to incur greater costs for an older than for a younger employee." *Older Workers Benefit Protection Act: Hearing Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and Special Comm. on Aging*, 101st Cong., 1st Sess. 62 (1989); see *id.* at 67. Shanor adverted to an EEOC regulation "which permits the extension of additional benefits to older workers to counteract problems of age discrimination," and explained that the amendment "simplifies" that regulation. *Id.* at 456. See 29 C.F.R. 1625.2(b); note 4, *infra*. Shanor gave substantially the same testimony to the House. *Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision: Joint Hearing Before House Select Comm. on*

Aging and the Subcomms. on Employment Opportunities and Labor-Management Relations of the Comm. on Education and Labor, 101st Cong., 1st Sess. 59, 64, 77 (1989). Thus, as long as the requirements in Section 623(f)(2)(B)(i) are satisfied, retiree health benefit plans that provide greater benefits to older than to younger protected workers do not violate the ADEA.

2. Ultimately, petitioner recognizes that a holding that the ADEA generally prohibits an employer from favoring older over younger protected workers does not endanger prevalent forms of retiree health benefit plans because it argues (Br. 36-38) that its own plan is protected by Section 4(f)(2)(B)(i). Petitioner, however, did not raise that issue in its motion to dismiss before the district court. Nor did it raise that issue on appeal. Accordingly, neither the district court nor the court of appeals resolved that issue. Because petitioner did not raise that issue in its motion to dismiss or on appeal, and because neither court resolved the issue, that question is not properly presented here. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001). Review of that issue is particularly unwarranted here, because Section 623(f)(2)(B)(i) is an affirmative defense on which the employer has the burden of proof, and evidence has not yet been directed to the question whether the preconditions of that defense have been satisfied.

That does not mean that petitioner is foreclosed from raising that issue in this litigation. After the court of appeals issued its decision, petitioner filed an answer in the district court in which it asserted Section 623(f)(2)(B)(i) as an affirmative defense. The district court is the proper forum for resolving the issue in the first instance.[3]

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[3] Petitioner asserts (Br. 45) that employers favor older over younger employees in the protected group infrequently. There is some tension between that statement and petitioner's assertion that benefit plans that favor older workers in the protected group are "virtually ubiquitous."

E. The EEOC Has Interpreted The ADEA To Prohibit An Employer From Favoring Older Over Younger Protected Workers, And Its Interpretation Warrants Deference

For the reasons discussed above, it is clear that the ADEA generally bars an employer from favoring older over younger protected workers. If the Court were to conclude that Congress did not resolve that question conclusively, however, it should defer to the EEOC's authoritative determination that the ADEA generally bars such discrimination. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Counsel*, 467 U.S. 837, 842-845 (1984) (where Congress has not spoken directly to an issue, courts should defer to agency's construction, provided that the construction is reasonable).

1. The Department of Labor initially had responsibility for enforcement of the ADEA. That responsibility was subsequently transferred to the EEOC, and the EEOC is now the exclusive federal agency responsible for enforcing the ADEA. 29 U.S.C. 625 note, 626. Congress has also delegated to the EEOC authority to promulgate regulations to carry out the purposes of the ADEA. 29 U.S.C. 628.

In 1981, following notice and comment, the EEOC issued an interpretive regulation that provides that it is unlawful for an employer to prefer one worker in the protected group over another in the protected group because of either individual's age. 29 C.F.R. 1625.2(a). The regulation, which

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Moreover, petitioner appears to suggest (Br. 33-34) that some employers may favor older members of the protected group in layoffs in order to minimize the chance that older workers will challenge the layoffs under the ADEA. Ultimately, however, the question is not whether discrimination that favors older over younger workers in the protected class is frequent, but whether it is prohibited by the ADEA. *Cf. Oncale*, 523 U.S. at 79. For the reasons discussed in this brief, the ADEA prohibits such discrimination unless one of the Act's affirmative defenses applies.

tracks a similar regulation issued by the Department of Labor in 1968 (29 C.F.R. 860.91), provides that:

> It is unlawful in situations where this Act applies, for an employer to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.[4]

The EEOC has also applied its regulation in a legally binding and precedential federal sector adjudication. *Garrett* v. *Runyon*, No. 01960422, 1997 WL 574739 (Sept. 5, 1997), aff'd in relevant part on reconsideration, No. 01960422, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999). In *Garrett*, the EEOC held that the United States Postal Service could not use "earliest date of birth" as a tie-breaker when determining seniority for purposes of assigning rural carrier routes. *Ibid.* See 29 U.S.C. 633a(a) (prohibiting age discrimination by federal agencies); 29 U.S.C. 633a(b) (giving EEOC authority to enforce the federal sector prohibition through appropriate remedies).[5]

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[4] The EEOC's regulation creates an exception to that general prohibition. Under that exception, "[t]he extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful" when the employer "has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination," provided the extension of additional benefits is not used as a means to commit other forms of discrimination outside the context of benefits. 29 CFR 1625.2(b). Because petitioner did not rely on that exception in its motion to dismiss or on appeal, and because neither court below addressed it, that exception is not at issue here.

[5] Three other federal sector decisions that predated *Garrett* contain statements that the ADEA does not prohibit treating younger workers in the protected class less favorably than older protected workers. *Isabella* v. *Runyon*, No. 01944083, 1995 WL 653513 (E.E.O.C. Oct. 19, 1995);

For the reasons discussed in this brief, "the EEOC's interpretation is a true rendering of the language" (Pet. App. 10a) and accurately reflects Congress's clearly expressed intent. At the very least, however, the EEOC's construction of the ADEA is reasonable. Accordingly, if the Court concludes that the relevant sources of legislative intent do not conclusively resolve the issue, it should defer to the EEOC's longstanding construction under *Chevron*.

2. Petitioner contends (Br. 39) that the EEOC's interpretation does not qualify for *Chevron* deference, but should instead be examined under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). That contention is incorrect. The EEOC has authority to enforce the ADEA and to issue regulations

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DuPriest v. *Bentsen*, No. 01942145, 1994 WL 1755951 (E.E.O.C. May 2, 1994); *Burt* v. *Bentsen*, No. 01942163, 1994 WL 735377 (E.E.O.C. Apr. 29, 1994). Because those decisions were not circulated to the Commission, their reasoning lacks precedential value. The results in those cases are independently justified because all involved challenges to the use of a minimum age as a condition of early retirement programs, and the ADEA does not bar that practice. See 29 U.S.C. 623(*l*)(1)(A) (minimum age for eligibility for normal or early retirement benefits is not a violation of the ADEA). An early Department of Labor (DOL) opinion letter concluded that the ADEA prohibited an employer from reserving certain positions for persons over the age of 50. The letter disapproved that practice on the ground that it "could be taken as a precedent for giving older workers certain jobs at lesser rates of pay simply to keep them employed, or could be interpreted as a preference for one group of older workers (that is, those over 50) over another group (those 40 to 50 who are also entitled to the protection of the law)." Letter WH-30, 1970 WL 26398 (May 1, 1970). Another early DOL letter took the same position. Letter WH-36, 1970 WL 26404 (May 25, 1970). Three later letters approved extending more favorable treatment to older workers in the protected group. Letter WH-389, 1976 WL 41742 (June 25, 1976) (contractual provision extending preference to persons 55 and older); Letter WH-404, 1976 WL 41753 (Aug. 26, 1976) (contractual provision reserving every fifth journeyman position to persons 55 and older); Letter WH-451, 1978 WL 51448 (Jan. 31, 1978) (plan providing greater severance pay to older workers). Those letters stated that DOL's interpretive regulation prohibiting such discrimination would be amended, but such an amendment never occurred.

to carry out its purpose; it issued its interpretation after notice and comment; it framed its regulation as a mandatory legal duty; it applied the regulation in a legally binding adjudication that has precedential force; and its interpretation is consistent with the Department of Labor's initial interpretation of the ADEA in 1968. In those circumstances, the EEOC's interpretation is entitled to *Chevron* deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001); see *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 84-87 (2002) (deferring to an EEOC regulation); Barnhart v. *Walton*, 535 U.S. 212, 221-222 (2002); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996).

This case, however, does not require the Court to decide whether the EEOC's interpretation is entitled to *Chevron* or *Skidmore* deference. The text and structure of the ADEA make clear that it generally bars an employer from favoring older over younger protected workers, and that an employer seeking to engage in such discrimination must rely on one of the ADEA's affirmative defenses. The EEOC's longstanding interpretation both reflects and supports that conclusion. Cf. *Edelman* v. *Lynchburg College*, 535 U.S. 106, 114 (2002) (declining to fix the precise level of deference because EEOC's interpretation was "not only a reasonable one," but the correct one).

* * *

As the text makes plain, the ADEA prohibits discrimination because of age. The Act prohibits discrimination even if "one person in the protected class has lost out to another person in the protected class," and without regard to whether the one who lost out is the older or younger of the two, "so long as he lost out *because of age*." *O'Connor*, 517 U.S. at 312. The basic prohibition generally precludes consideration of age in advertising, hiring, promotion, and firing and promotes the evaluation of candidates on the basis of

abilities, rather than age. When it comes to benefits, however, affirmative defenses allow employers to provide additional benefits to members who have reached a certain age as long as certain conditions are met. Accordingly, there is no reason to read the ADEA as indifferent to discrimination because of age when an employer favors older workers. The ADEA, as a whole, both generally prohibits discrimination because of age, while specifically addressing the case of benefits.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2003

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* The Solicitor General is recused from this case.

APPENDIX

1. 29 U.S.C. 621 provides:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

2. 29 U.S.C. 623 provides in pertinent part:

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * * * *

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitaion, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably neces-

sary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section—

* * * * *

(B) to observe the terms of a bona fide employee benefit plan—

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause

(i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter;

* * * * *

(*l*) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section—

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because—

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits;

* * * * *

3. 29 U.S.C. 628 provides:

§ 628 Rules and regulations, exemptions

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and it may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

* * * * *

4. 29 U.S.C. 631 provides:

§ 631 Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

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